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In The Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the League of California Cities submits this brief in support of petitioners.[1] This case involves a challenge based upon the Takings Clause of the Fifth Amendment to the right of democratically elected legislatures to establish economic policy. Seeking to preserve competition in the retail gasoline market, the State Legislature of Hawaii limited the rent oil companies may charge dealer/lessees to use oil company-owned service stations. The Ninth Circuit Court of Appeals found that federal courts have the power to strike down such statutes as "takings" where the court determines, based on its own weighing of evidence presented in court, that the regulation will not be effective.

Each of the member cities of the League is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision in this case. Because the Ninth Circuit's transfer of power to formulate economic policy from legislatures to courts could have pervasive implications for local regulatory authority under the police power, this Court should consider the cities' viewpoint in this brief.[2]

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[1] The League of California Cities is an association of all 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing the 16 divisions of the League from all parts of the state. The Committee monitors appellate litigation affecting municipalities and identifies those cases that are of statewide significance.

[2] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a blanket consent to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is which branch of government determines economic policy: democratically elected legislatures or courts. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) has led to this controversy. In that case, the Court stated that courts are empowered to find that a regulation effects a "taking" of property under the Takings Clause of the Fifth Amendment if the regulation fails to "substantially advance legitimate state interests." *Id.* at 260. Here, the Ninth Circuit applied the substantially advance test to make economic policy. *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001) ("*Chevron I*"), *on remand*, 198 F.Supp.2d 1182 (D. Ha. 2002), *aff'd sub nom., Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004) ("*Chevron II*").

The Court should reverse the Ninth Circuit opinion for two reasons. First, in applying the substantially advance test to the Hawaii law in question, the Ninth Circuit usurped legislative power. The lower court determined that the regulatory means chosen by the Hawaii Legislature to address an economic problem will not be effective to achieve its ends. Until *Agins*, this Court had consistently held that the Due Process Clause provides the proper framework for judicial review of the wisdom and efficacy of government regulation. The Court limited regulatory takings to circumstances where regulation severely diminishes property value. The text of the Takings Clause, its original understanding, takings jurisprudence, and fundamental principles of democracy provide no support for importing a means-ends test to the Takings Clause.

Second, since *Agins*, this Court and the lower federal and state courts have interpreted the substantially advance takings test to require either: (1) deferential judicial review – a test akin to rational basis, ordinarily associated with the Due Process Clause; or (2) nondeferential review – known as "heightened scrutiny." The nondeferential standard of review arises from this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that the judiciary may apply heightened scrutiny to exactions of physical interests in land imposed as conditions of approval of individual permit applications. However, as this Court recognized in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999): "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use."

Nevertheless, in this case, the Ninth Circuit went beyond administratively imposed, adjudicatory land exactions to apply heightened scrutiny to price control legislation. The Ninth Circuit opinion allows the courts to discard any notion of deference to the decisions of a legislative body as to the efficacy of economic regulation. Accordingly, the Ninth Circuit has vastly expanded judicial power to second-guess legislative policy decisions. Under *Chevron*, unelected and life-tenured judges would become super-legislatures, substituting their judgments as to wise and effective economic policy for those of elected and politically accountable representatives. This frontal assault on representative democracy runs contrary to basic principles of separation of powers and should be rejected by this Court. Finally, because the heightened

standard of judicial review embraced in *Chevron* would be more attractive to takings claimants than the deferential standard applied in most state courts, *Chevron* would promote forum-shopping and deluge the federal courts with challenges to a variety of economic regulations.

STATEMENT OF THE CASE

In 1997 Hawaii adopted Act 257 ("Act") to, among other things, limit rents that oil companies may charge their retail gas station dealer/lessees for leasing company-owned stations to 15% of the dealer/lessee's gross profit from gasoline sales. App. 2.[3] The Act is designed to prevent oil companies from increasing rents to levels that would likely push independent dealers out of the already limited retail gasoline market.

Relying on *Agins*, *Nollan*, and *Yee v. City of Escondido*, 503 U.S. 519 (1992), Chevron challenged the Act as a regulatory taking on the ground, among others, that the Act does not substantially advance legitimate state interests. App. 3, 103. Applying heightened scrutiny to the Act, the district court entered summary judgment for Chevron on its takings claim. App. 103-116.

In a two-to-one decision in *Chevron I*, the Ninth Circuit concluded that the district court correctly held that heightened scrutiny applied, allowing the court to inquire into the efficacy of the Act. App. 58-60. However, the majority found that whether the Act substantially advanced

[3] Citations to the decisions of the lower courts are to the Appendix to the Petition for a Writ of Certiorari.

legitimate state interests raised triable issues of fact, and remanded the case to the district court for an evidentiary hearing as to whether the Act would actually accomplish its purpose. App. 79.[4]

On remand, the district court applied the substantially advance standard to determine whether the Act effected a taking. To predict the economic effects of the Act, the court heard testimony from economists representing each side. App. 40-50. The district court agreed with the theories advanced by Chevron's economist. The district court concluded that the Act effects a taking because it "does not substantially advance the State's legitimate interest in lowering gasoline prices." App. 53.

On appeal in *Chevron II*, the State argued that the substantially advance standard is not a legitimate test for a taking, and even if it were, that the district court, out of deference to the judgment of the Hawaii Legislature, should have applied a standard of review equivalent to the due process rational basis test. App. 5. The same panel of the Ninth Circuit affirmed, again in a two-to-one decision. Relying on the law of the case, the majority rejected the State's arguments. App. 13-16. The court addressed the State's arguments on the merits, however, finding that the court's application of heightened review in *Chevron I* was not clearly erroneous. App. 14-16. In his dissenting opinion, Judge Fletcher objected to the court's application of heightened scrutiny: "Rent control is often inefficient and

[4] The Ninth Circuit mistakenly assumed that the purpose of the Act was to *decrease* current gasoline prices, rather than to maintain robust competition, prevent monopolization, and ultimately avoid consumer price *increases*. App. 18, 21.

sometimes unfair. But we should not confuse inefficiency and unfairness with unconstitutionality." App. 29.

ARGUMENT

I. THE COURT SHOULD PRESERVE THE AUTHORITY OF ELECTED LEGISLATURES TO DECIDE THE WISDOM AND EFFICACY OF ECONOMIC REGULATION.

A reversal of *Chevron* is critically important for *amici* cities. The cities – like the state and federal government – have enacted scores of laws regulating economic activity to promote the general health, safety, and welfare and continue to enact such regulations daily. *Chevron* invites legal challenges to every one of these regulations as a taking.

Chevron allows aggrieved property owners, and indeed, businesses of all kinds, to avoid the political process entirely. If the decision stands, courts could be permitted to assume the role of legislatures, and the public would be denied a voice in matters that have direct and immediate impact on their health, safety, property values, economic welfare, and quality of life. The framers of the Constitution could not possibly have intended this result.[5] This Court should therefore overrule *Chevron* and

[5] *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 1776 (2004) ("Sometimes ... the judicial department has no business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches. ..."); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that ... even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how

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establish a standard of review of economic regulation that preserves traditional deference to the policy decisions of legislative bodies, whether federal, state, or local. Reaffirming deferential judicial review of legislative economic regulations is essential for the continuing vitality of "the democratic faith which we profess." *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

A. *Chevron* Conflicts with Representative Democracy.

The Constitution embodies the doctrine of separation of powers between the legislative and judicial branches. The separation of powers protects decisions of the legislature from lateral attack by another branch. *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). The legislative and executive branches hold authority to make social and economic policy. As the Supreme Court has consistently recognized in cases involving the powers of the other branches, the

unwisely we may think a political branch has acted."); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (question is political rather than legal where it is impossible for court to "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of the government"); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting) ("[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decision-making, by allowing individual judges in city after city to second-guess ... legislative ... determinations" on aesthetic matters); *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 258 (1977) (Powell, J., concurring) ("Under our democratic system of government, decisions on ... critical issues of public policy have been entrusted to elected officials who ultimately are responsible to the voters.").

Constitution limits the role of the judiciary to restraining the *arbitrary* exercise of legislative authority. *E.g.*, *Dolan*, 512 U.S. at 391 n.8.

The hallmark of democracy is "participatory self-government." Steven Breyer, "Our Democratic Constitution," Harvard University Tanner Lectures on Human Values 2004-2005 (Nov. 17-19, 2004), at 5; *see also id.* at 39. To work effectively, a democratic system must allow citizens equal opportunity to control the decision making agenda. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 112-13 (1989). Each citizen must also possess the right to express preferences for a decision, meaning that each citizen's vote should receive equal weight. *Id.* at 109. Majority rule promotes this self-determination. "[T]he strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves." *Id.* at 138.

One of the primary roles of the judiciary is to rein in the excesses of the other branches of government. The judiciary ensures that legislative enactments and executive actions are within the Constitution. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 153 (2001). The role of the courts in reviewing legislation to protect fundamental liberties is well established. *Id.* When courts venture outside this realm into policy making that does not implicate fundamental rights, however, the courts frustrate democratic ideals. *Id.* at 153-54. Allowing judges to review legislative policy under a test as standardless as the means-ends takings analysis applied in the instant case creates the risk that their personal philosophical beliefs will color their decisions. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 272-76, 473-74 (1995) (highlighting risks of judicial activism).

Once accepted, judicial review of legislation under the substantially advance test has no principled stopping point. And placing power in the hands of an unelected, life-tenured judiciary to declare that regulations are takings on the grounds that they will not achieve their avowed purpose conflicts sharply with self-governance. In recognition of these hallmark principles of our democratic system of government, this Court has consistently and sharply limited the authority of judges to interfere with legislative control of purely economic activity, by confining searching judicial review to regulations that affect fundamental rights. *See*, *e.g.*, *Williamson v. Lee Optical*, 348 U.S. 483, 487-89 (1955).

Act 257 does not implicate fundamental rights. Accordingly, the determination that the regulation will achieve some legitimate state interest should be subject to the sound discretion of the legislature. Whether a price control such as that at issue here will have its intended effect in a complex industry may be debated in lengthy legislative committee hearings, in which economists, consumer advocates, industry participants, and even individual legislators present divergent views on the question. Along with that gathering of evidence, legislators weigh the opinions of constituents affected by the proposed regulation, and then fashion a policy intended to promote the general health, safety, and welfare.

Predicting the impact of price controls in a complex business such as the motor fuel industry is quintessentially a legislative policy function. The courts have no greater right to legislate this policy than they have to dictate zoning decisions, safety requirements for autos, or the proper procedure for pasteurizing milk. In this case, by extending no deference to the State Legislature of Hawaii

on a question of economics, the district court assumed a legislative role. Had the district court based its decision on past effects on retail gasoline prices, the court would nonetheless have usurped the legislature's policy making function. But here, the district court engaged in a particularly egregious violation of the separation of powers by sustaining a *facial* challenge to the Act. The trial court *predicted* that the Act *would have* particular effects. The expert testimony predicting the effects of the Act was not "evidence," however, nor were the district court's rulings findings of "fact" or conclusions of "law." *See* App. 32, 50. The expert testimony on which the district court here relied was little more than speculation as to the effects of the Act. The court simply embraced one economic theory over another. *See* App. 43. In any event, the process of determining economic policy by predicting the economic effects of proposed regulation is fundamentally a legislative function. It is not a function the courts are well-equipped to perform and it is outside of their proper adjudicative role.

Chevron raises the potential for abuse of judicial power with regard to all government regulation, not merely price controls. If *Chevron* were allowed to stand, then the deferential rational basis test, historically applicable to economic legislation, would be eviscerated. The court's proposal in *Chevron* that the federal courts should conduct their own evidentiary hearings to predict the effects of legislation defeats principles of self-governance and representative democracy.[6]

[6] The *Chevron I* majority noted that its decision should be narrowly applied and that it "save[s] for another day the question of whether the 'substantially advances' test applies outside the context of rent control

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B. *Chevron* Would Promote Inefficiency and Chaos in Economic Policymaking.

If courts were the final arbiters of economic policy, the legislative enactment of an economic policy would mark only the beginning of the decision making process. The validity of any policy would remain unsettled for years as challenges to the legislation wound their way through the courts. Removing certainty as to the validity of economic regulation would chill business and real estate investment.

Moreover, the nondeferential standard of judicial review will flood the courts with lawsuits by business and property owners, as virtually any economic regulation would be subject to challenge as a taking. The government could be compelled to defend thousands of laws in evidentiary proceedings, at colossal cost to the taxpayers.

Nor do the courts have the institutional competence to study and mediate between competing interests in any industry – a function that is the essence of law making. A court confronted with a complex issue of economic regulation is no substitute for a local legislative agency that can see the larger picture in its jurisdiction or region. Economic regulations are often interdependent. Effective economic regulation requires a broader perspective than one isolated case at one point in time. Decisions as to the most effective economic policies are best made by legislatures taking the initiative to identify problems, receiving

statutes that permit the capture of a premium." App. 65. But the court's reasoning that legislatures cannot be entrusted to make policy with respect to the economic relations between commercial landlords and tenants could logically be applied to all types of regulation.

evidence from a wide range of affected parties and interest groups, debating the advantages and disadvantages of alternative policies, and compromising in order to reach a majority decision. A court with hundreds of cases on its docket is not the proper forum to make such economic policy.

C. *Chevron* Would Encourage Forum Shopping and Multiply Litigation in the Federal Courts.

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-95 (1985), this Court held that a takings claimant must seek compensation in state court under state procedures before a federal takings claim arises. Contradicting *Williamson County*, however, the Ninth Circuit has held that a facial challenge to regulation on the ground that it does not substantially advance legitimate state interests is ripe in federal court even though the claimant has not sought compensation in state court. *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998).

Although it is settled law in California that deferential judicial review applies to economic legislation challenged under the Takings Clause, *see San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 101-03 (Cal. 2002); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1001-02 (Cal. 1999), *cert. denied*, 526 U.S. 1131, *Chevron* applies nondeferential review. While most takings claims must be litigated in state court, *Chevron's* more favorable treatment of facial substantially advance claims will generate considerably more substantially advance

takings challenges to legislation and induce many takings claimants to elect the federal forum, in defiance of *Williamson County*. The result would be confusion and inconsistent adjudications as between the federal and state courts. *Amici* cities would find it difficult to discharge their governmental functions under such uncertainty as to the standard of judicial review of their enactments. Moreover, the more generous federal courts would be deluged with challenges to every manner of local economic regulation.

II. THE COURT SHOULD DISAPPROVE THE SUBSTANTIALLY ADVANCE TEST FOR REGULATORY TAKINGS OTHER THAN ADJUDICATORY EXACTIONS.

A. The Substantially Advance Test is Not a Legitimate Takings Test.

The legitimacy of the substantially advance test as a test for a regulatory taking is open to serious debate. The degree of judicial deference to legislative enactments has fluctuated over time. Between 1897 and 1936, the Supreme Court imposed a *laissez faire* economic philosophy, interfering with legislated health and safety regulation. In its most extreme application of *laissez faire*, *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a state law designed to safeguard the health of bakers by limiting their working hours. In *Lochner*, the Court intruded on a core police power, freely exercising its own judgment as to the appropriate policy for the health of bakers. *See id.* at 56-57. But Justice Oliver Wendell Holmes' dissent in *Lochner* laid the foundation for the eventual repudiation of *Lochner's* free-market philosophy: "Some of these laws embody convictions or prejudices

which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*. . . ." *Id.* at 75.

Beginning in 1934 and continuing for more than 50 years, the Court abandoned the intrusive *Lochner* standard.[7] In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court thoroughly embraced the deferential standard of review of economic legislation:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . . *Id.* at 152.

Since the demise of *Lochnerian* substantive due process, this Court has generally reviewed economic regulation under the Due Process Clause by applying the deferential rational basis test.[8] Under that test, the court must uphold the regulation unless no reason can be conceived to support it. *Carolene Products*, 304 U.S. at 152.

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[7] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose"); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.").

[8] *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 11, 14 (1988) (proper standard of judicial review of legislative rent control is deferential); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Id.* Indeed, in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), this Court upheld a Maryland statute strikingly similar to Act 257 against a due process challenge. The Maryland law sought to foster competition among retail gas suppliers by prohibiting oil companies from owning retail gas stations. The Court emphatically rejected the notion that the courts have a role in forging this type of economic policy:

> Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But . . . this argument rests simply on an evaluation of the economic wisdom of the statute, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Id.* at 124 (citations omitted).

In *Agins*, however, in 1980, this Court set the stage for a potentially different standard of judicial review of economic regulation. In that case, the Court introduced a means-ends test for land use regulation under the Takings Clause. The Court stated in dictum that the application of a zoning law to property effects a taking if the law "does not substantially advance legitimate state interests." 447 U.S. at 260.

The substantially advance test conflicts with the plain language of the Takings Clause, which requires the payment of compensation for taking of private property for public use. It is difficult to discern how the failure of a regulation to fulfill a valid public purpose could "take" property. Before *Agins*, the Takings Clause had never been understood as a substantive limit on governmental power. As one commentator observed, the Framers of the Constitution did not intend the Takings Clause

> to impose a substantive limit on congressional expropriations. Rather, they intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures). In essence, the drafters merely intended to ensure that compensation was given when a citizen was called upon to contribute more than his fair share to support the government. . . . [I]f read properly, the expropriation clause of the Fifth Amendment is nothing more than a compensation clause. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1248-49 (2002)

See also Eastern Enterprises, Inc. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting) ("the Takings Clause . . . has not been understood to be a substantive or absolute limit on the Government's power to act"); *id.* at 554 (Breyer, J., dissenting) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good.") (emphasis original).

Moreover, the substantially advance test lacks any basis in takings jurisprudence. In *Penn Central Transportation*

Co. v. City of New York, 438 U.S. 104, 127 (1978), the Court first referred to a means-ends test under the Taking Clause in reliance on two due process cases, *Nectow v. Cambridge*, 277 U.S. 183 (1928) and *Moore v. East Cleveland*, 431 U.S. 494 (1977). Two years later, in *Agins*, the Court formalized this means-ends test for a taking, once again relying on *Nectow*. *Agins*, 447 U.S. at 260. No takings decision of this Court supports grafting a means-ends test to the Takings Clause. To the contrary, the substantially advance test directly conflicts with other decisions of this Court. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) the Court unanimously held that takings analysis is not concerned with the effectiveness of legislation. *Id.* at 487 n.16; *id.* at 511 n.3 (Rehnquist, J., dissenting). And in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), the Court concluded that courts should defer to the legislative determination of public purpose in direct condemnation actions. *Id.* at 242. There is no principled reason to depart from that rule in inverse condemnation.

B. If the Substantially Advance Test Were a Legitimate Takings Test, the Standard of Review Under That Test Should be Equivalent to the Due Process Standard.

Even if the Court does not repudiate the substantially advance test, it should settle the meaning of the test. Since the Court decided *Agins*, different standards of judicial review have evolved under the substantially advance test. Nondeferential review of the type employed here by the Ninth Circuit, known as "heightened scrutiny," applies to "exactions" imposed on a case-by-case basis – where the government conditions approval on an owner's

dedication of land to the public to offset the impact of a proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385. Heightened scrutiny imposes the burden on the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The Court has also found that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *see also Dolan*, 512 U.S. at 385.

In contrast, this Court has indicated that a deferential standard continues to apply to generally applicable economic regulation because the risk of the use of the police power to exact unconstitutional conditions is not present. *Nollan*, 483 U.S. at 834-35; *see also Dolan*, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[] essentially legislative determinations classifying entire areas of the city"). The implicit justification for this distinction is that groups of citizens have greater power to influence land use policy in the legislative process and thus require less protection from government overreaching than do individuals engaged in administrative, adjudicatory decision-making proceedings. *See id.*

Consistent with *Nollan* and *Dolan*, five justices in *Eastern Enterprises* held that courts should apply deferential review to the substance of generally applicable legislation. Significantly, a majority of the justices rejected the notion that the "substantially advance" prong of *Agins* enunciated a freestanding takings test outside the *Nollan/Dolan* context of administratively compelled dedications of land. Five justices indicated that the deferential substantive due process test, rather than a takings analysis, should

be applied to a law requiring the payment of money. 524 U.S. at 545-46 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). As Justice Kennedy stated, the wisdom of governmental action that does not require the dedication of possessory interests in real property is more appropriately analyzed under "general due process principles rather than under the Takings Clause." *Id.* at 545 (Kennedy, J., concurring and dissenting).[9] Accordingly, if the Court determines that the substantially advance test is a legitimate takings test, then the Court should rule that the substantially advance test requires no higher standard of judicial review of economic legislation than the rational basis test applied under due process.

[9] Other circuit courts have treated as binding this Court's five-four majority holding in *Eastern Enterprises* that the Takings Clause is not a substantive limit on the state's police power. In *Commonwealth Edison Company v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), the court observed: ["F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority." *Id.* at 1339-40; *see also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (lower courts "are bound to follow the five-four vote (in *Eastern Enterprises*) against the takings claim. . . ."); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same).

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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